



IN THE CIRCUIT COURT OF LIMESTONE COUNTY, ALABAMA

STATE OF ALABAMA,

PLAINTIFF,

vs.

CASE NO. CC19-476

BLAKELY, MICHAEL ANTHONY,

DEFENDANT.

**MOTION TO DECLARE THE ALABAMA ETHICS ACT UNCONSTITUTIONAL AND
TO DISMISS THE INDICTMENT**

Comes now the Defendant by and through counsel and hereby moves this Honorable Court to declare the Alabama Ethics Act , §36-25-1 et seq. (“the Ethics Act”), unconstitutional and unconstitutional in its application in this case, and to dismiss the indictment. As grounds the Defendant states as follows:

1. The Ethics Act is unconstitutionally vague as charged in the indictment. The sections of the Ethics Act charged in the indictment, and therefore the indictment itself, are void for vagueness. In United States v. Wilson, 553 U.S. 285, 304 (2008), the United States Supreme Court noted that “a conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standard that it authorizes or encourages seriously discriminatory enforcement.

2. The Alabama Court of Criminal Appeals recently collected the fundamental principles of vagueness as follows:

*

“The doctrine of vagueness . . . originates in the Due Process Clause of the Fourteenth Amendment, see Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888(1939), and is the basis for striking down legislation which contains insufficient warning of what conduct is unlawful, . . . “

*

“Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 811, 98 L.Ed. 989, 996 (1954).”

*

”A vague statute does not give adequate ‘notice of the required conduct to one who would avoid its penalties,’ Boyce Motor Lines v. United States, 342 U.S. 337, 340, 72 S.Ct. 329, 330, 96 L.Ed. 367 (1952), is not ‘sufficiently focused to forewarn of both its reach and coverage’ United States v. National Dairy Products Corporation, 372 U.S. at 33, 83 S. St. at 598, 9L.Ed. 2d at 566, and ‘may trap the innocent by not providing a fair warning,’ Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed.2d 222, 227-28 (1972).”

*

“There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the act, or in regard to the applicable tests ascertain guilt.” Winters v. New York, 333 U.S. 507, 515-516 (1948).

*

“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” Kolendar v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed. 2d 903 (1983). A statute challenged of vagueness must therefore be scrutinized to determine whether it provides both fair notice to the public that certain conduct is proscribed and minimal guidelines to aid officials in the enforcement of that proscription. See Kolender, supra; Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed. 2d 222 (1972).

State v. Baker, No. CR-13-0142, WL 6608394 (Ala. Crim. App. Nov. 21, 2014).

3. The Rule of Lenity mandates that the Ethics Act be strictly construed in favor of a defendant. According to the United States Supreme Court, “The rule of lenity requires interpreters to resolve ambiguity in criminal laws in favor of defendants.” Whitman v. United States, 135 S. Ct. 352 (2014). “Deferring to the prosecuting branch’s expansive views of these statutes ‘would turn [their] normal construction . . . upside down, replacing the doctrine of lenity with a doctrine of severity.’” Id at 353 (quoting Crandon v. United States, 494 U.S. 152 (1990) (Scalia, J., concurring in judgment)). [I]t is well established that criminal statutes should not be ‘extended by construction’” Ex part Mutrie, 658 So.2d 347 (Ala.1993) (quoting Ex parterres, 434 So.2d 813 (Ala. 1983), quoting in turn Locklear v. State, 282 So.2d 116 (A;a. Crim. App. 1973)). the basic rule when reviewing criminal cases is that the statutes are to be strictly construed in favor of those persons sought to be subject to their operations: the defendants. Schooner v. State, 90 So.2d 234 cert. denied, 90 So.2d 238 (Ala. Ct. App. 1956). “No person is to be made subject to penal statutes by implication and all doubts concerning their interpretation are to predominate in favor of the accused.” Fuller v. State, 60 So.2d 202 (Ala. 1952) (quoting Scott v. State, 44 So. 544 (A;a. 1907). The fundamental rule is that criminal statutes must be strictly construed in favor of the accused. Ex part Jackson, 614, So.2d 405, 406 (Ala. 1993). A person can not be

subjected to penalty unless the words of the statute plainly impose that penalty. Keppel v. Tiffin Savings Bank, 197 U.S. 356, 362 (1905). In determining the proper application of a statute, the Court has a duty to “ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from language used, the reason and necessity for the act, and the purpose sought to be obtained.” Hunt v. State, 642 So.2d 1060 (Ala.Crim. App. 1993) aff’d sub nom. Ex part Hunt, 642 So.2d 1060 (Ala. 1994) (quoting Ex part Holliday, 466 So. 2d 956, 960 (Ala.1985)); see also Rutledge v. State, 745 So.2d 912 (Ala. Crime. App. 1999). “Words used in the statute must be given their natural, plain, ordinary and commonly understood meaning.” Alabama Farm bureau Mut. Ins. Co. v.City of Hartselle, 460 So.2d 1219, 1213 (Ala. 1984).

4. The general rule of construction for the provision of the Alabama Code is found in Ala. Code § 13A-1-6 which clearly states that: “All provisions of this title shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law, including the purposes stated in § 13A-1-3.” Among the purposes stated in §13A-1-3, subsection (2) requires the State: “To give fair warning of the nature of the conduct processed.” the Ethics Commission has agreed with the purpose of construing criminal laws: “In order to prohibit activity, it must be clearly spelled out so that the affected individuals can easily understand what is and is not prohibited.” emphasis added. Ethics Commission Advisory Opinion No. 2011-09 at 8.

5. The Ethics Act, As charged, is unconstitutionally over broad. The sections of the Ethics Act charged in the indictment, and therefore the indictment itself, are unconstitutionally overlord in that relevant portions of the Ethics Act Prohibit constitutionally protected conduct. “A cleat and precise enactment may nonetheless be ‘over broad’ if in its reach it prohibits constitutionally protected conduct . . . Because overlord laws, like vague ones, deter privileged activity, our cases firmly establish appellant’s standing to raise an over broad challenge. The crucial question, then, is whether the ordinance sews within its prohibitions that what may not be punished under the First and Fourteenth Amendments.” Grained v. city of Rockford, 408 U.S. 104, 114-115 (1972).

6. An over broad statute is one that is designed to burden or punish activities that are not constitutionally protected, but which also includes within its scope activities that are protected. 3 Rotunda, Nowak, Young, Treatise on Constitutional Law, Substance and Procedure, §20.8 (1986); NCAA v. Button, 371 U.S. 415, 432, 83 S. Ct. 328, 337, 9 L.Ed. 2d 405(1963). However, the over breadth of a statute must be not only real, but substantial as well, judged in relationship to the statute’s plainly legitimate sweep. Broad wick v. Oklahoma, 413, U.S. 601, 615, 93 S. Ct. 2908. 2917, 37 L.Ed. 2d 830 (1973).

7. A statute is void for vagueness when its prohibition is so vague as to include protected conduct or as to leave an individual without knowledge as to the nature of conduct that is prohibited. See Kolenderv. Lawson, 461, U.S. 352, 103 S. Ct. 1855, 75 L.Ed. 2d 405 (1963); NAACP v. button, 371, U.S. 415, 432,433, *3 L.Ed.2d 405(1963; Rotunda, Nowak, Young, Treatise on Constitutional Lae Substance and Procedure, §20.9 (1986). Clear guidelines must exist regarding what is illegal so that there will be no “chilling effect” on the exercise of protected actions.

8. In the indictment, sub judice, the Defendant is charged in counts 7, 8, 10, 12 and 13 with using his official position or office for personal gain in violation of §36-25-5(a). No where in the statute does it specify what conduct is prohibited. Nor does it specifically explain the term “using” or “personal gain”.

9. The Defendant is charged in count 11 of the indictment with soliciting a thing of value from a subordinate in violation of §36-25-(e). Likewise, this statute does not specifically explain what conducts are prohibited and leaves it to a best guess as to what "solicitation" and “thing of value” mean.

10. The Defendant concedes that in similar cases, Alabama appellate courts have upheld the Alabama Ethics Act. However, identical issues are before the Alabama Supreme Court in Hubbard v. State, CC14-565 and CR-16-0012 from the Alabama Court of Criminal Appeals.

Wherefore, the Defendant respectfully moves this Honorable Court to declare the Alabama Ethics Act §35-5-1 et seq. unconstitutionally vague on its face and unconstitutionally broad in its application to this Defendant.

Respectfully submitted this the 22nd day of October, 2019.

/s/ Robert B. Tuten
 ROBERT B. TUTEN (TUT002)
 ASB # asb-4036-e56r
 Attorney for Defendant
 TUTEN LAW OFFICES
 256-536-6009
Alafiletbt@tutenlaw.com

/s/ Marcus Helstowski
 MARCUS HELSTOWSKI
 Co-Attorney for Defendant
 223 Eastside Square
 Huntsville, Alabama 35801
 256-534-3018
mhelstowski@yahoo.com

Of Council:
 Mark McDaniel
 McDaniel and McDaniel, LLC
 223 Eastside Sq
 Huntsville, AL 35801
 256-534-3018

CERTIFICATE OF SERVICE

This document has been filed electronically and served upon opposing counsel pursuant to the Administrative Procedure for Filing Signing and Verifying Documents by Electronic Means in the Alabama Judicial System. For any opposing counsel or unrepresented parties who are not registered to file electronically, a copy of this pleading shall be served via the U.S. mail, postage pre-paid, to the litigant's address as maintained in the office of the Circuit Clerk.

Done this 22nd day of October, 2019.

/s/ Robert B. Tuten
ROBERT B. TUTEN